The Texas Commission on Environmental Quality (commission) adopts amendments to §§101.302, 101.306, 101.372, 101.373, 101.376, and 101.378; new §§101.305, 101.338, 101.339, and 101.375; and the repeal of §101.338. The commission adopts §§101.302, 101.305, 101.338, 101.339, 101.372, 101.375, and 101.376 *with changes* to the proposed text as published in the April 28, 2006, issue of the *Texas Register* (31 TexReg 3492). The commission adopts §§101.306, 101.373, and 101.378 and the repeal of §101.338 *without changes* to the proposed text, and they will not be republished.

The repealed, new, and amended sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the Texas State Implementation Plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The Emissions Banking and Trading Program (EBTP) has been designed to offer flexibility and provide a market-based method of meeting required emission reductions. The program makes use of several types of emission credits including emission reduction credits (ERCs), mobile emission reduction credits (MERCs), discrete emission reduction credits (DERCs), and mobile discrete emission reduction credits (MDERCs). Flexibility has been built into the rules to create incentives for the early or permanent retirement of volatile organic compounds (VOC) and nitrogen oxides (NO_x) emissions credits.

In the October 5, 2005, edition of the *Federal Register* (70 FR 58154), the EPA published the proposed conditional approval of the DERC program as part of the SIP. The conditional approval was based on the commission submitting corrected program deficiencies to the EPA by December 1, 2006.

These revisions address the deficiencies, which the commission committed to correct in a letter to the EPA dated September 8, 2005.

The corrections include the prohibition of the future generation of DERCs from permanent shutdowns and allow only DERCs generated from permanent shutdowns before September 30, 2002, to remain available for use for no more than five years from the date of the commission's commitment letter. Any DERCs generated after September 30, 2002, would be removed from the DERC registry and not be available for use. The conditions also required revisions to §101.302(f) and §101.372(f)(7) and (8) to clarify that the EPA must approve individual transactions involving emission reductions generated in another state or nation as well as those transactions from one nonattainment area to another or from attainment counties into nonattainment areas. The amendments revise Chapter 101, Subchapter H, Emissions Banking and Trading, to include program audit and reporting requirements to satisfy the EPA's requirements for cap and trade programs. The requirements concerning program audits were not included in the EPA publication of conditional approval but were the subject of discussion between the commission and the EPA.

The conditions also required the change to Form DEC-1, Notice of Generation and Generator Certification of Discrete Emission Credits; Form MDEC-1, Notice of Generation and Generator of Mobile Discrete Emission Credits; and Form DEC-2, Notice of Intent to Use Discrete Emission Credits, to include a waiver of the federal statute of limitations for generators and users of discrete emission credits. With the revision of these forms and adoption of the proposed rule changes, the commission will have corrected all identified deficiencies in the DERC program.

The adopted rules also reflect changes to the Texas Health and Safety Code (THSC), §382.0172(c). Senate Bill (SB) 784 was adopted by the 79th Legislature, 2005, and allows additional options for credit from emission reductions achieved outside of the United States. The revisions allow the commission greater flexibility in its ability to approve the substitution of emission reductions outside the United States that may be used to satisfy reduction or trading requirements.

SECTION BY SECTION DISCUSSION

§101.302. General Provisions.

The commission adopts administrative changes throughout the rules to conform with *Texas Register* requirements and agency guidelines.

In order to better organize similar rule requirements, the commission deletes §101.302(a)(2) and (f)(3) and relocates this language concerning emission creditable reductions occurring outside the United States to new §101.305, Emission Reductions Achieved Outside the United States.

The commission amends §101.302(d)(1)(C)(vi) to allow the rejection of an emission credit quantification protocol if the EPA objects to the protocol during a 45-day adequacy review period or if the EPA publishes in the *Federal Register* a disapproval of the protocol. This does not substantially affect the procedures to approve the quantification protocol. The commission has, and will continue, to work with the EPA to approve new quantification protocols. This revision clarifies in the rule that the quantification protocols would not be approved if the EPA objects to them. To be consistent with

the reorganization of requirements applicable to emission reductions outside the United States, the commission is deleting the reference to "nation" in §101.302(f)(1).

§101.305. Emission Reductions Achieved Outside the United States.

The new §101.305 combines the existing language concerning the use of emission reductions from outside the United States that is moved from §101.302(f)(3) and (a)(2) for better organization. Emission reductions in Mexico used under THSC, §382.0172(b), must be generated and used consistent with federal requirements which restrict the generation and use of ERCs to nonattainment areas. The revisions reflect the SB 784 change to THSC, §382.0172(c), which allows facilities to substitute emission reductions in criteria or precursor pollutants outside the United States if it is a reduction in an air contaminant for which the area, where the facility is located, has been designated as nonattainment, or if the reduction will result in a greater overall health benefit for the area. Should El Paso remain in nonattainment status, emission reductions and the generation of ERCs must meet federal requirements and are subject to EPA approval. If, as expected, El Paso is redesignated as an attainment area, the adopted rule change will allow beneficial emission reduction substitutions to continue as a result of reductions achieved in Ciudad Juárez without relating those emission reductions to the attainment status of El Paso.

In response to public comment, the commission is inserting a reference to precursors of criteria pollutants into §101.305(b) and substituting the word "and" for "if" in regard to reducing a criteria pollutant and its greater health benefit. The commission is substituting "Mexican" for "international"

in §101.305(c) for greater specificity. The commission is also adding the EPA as an approving authority for the validity of creditable reductions.

The commission is moving the rules governing optional reductions to their own sections (§§101.305, 101.338, and 101.375) so that they may be considered separately by the EPA for approval into the SIP and will not delay approval of other portions of the EBTP.

§101.306. Emission Credit Use.

The amendment to §101.306(a)(5) modifies the section to be consistent with the allowed use of ERCs under §101.399, Allowance Banking and Trading. This revision is necessary because of a previous adoption of Chapter 101, Subchapter H, Division 6, Highly-Reactive Volatile Organic Compound Emissions Cap and Trade Program, and allows facilities to use ERCs as allowances under the highly-reactive volatile organic compound cap and trade program.

§101.338. Emission Reductions Achieved Outside the United States.

The existing §101.338 is repealed. The new §101.338 reflects the revisions to THSC, §382.0172(c) and provides the commission more discretion in approving the substitution of emission reductions achieved outside the United States for emissions from electric generating or grandfathered facilities. In response to public comment, the commission is inserting the phrase “to meet the allowance holding requirements of this division” in §101.338(a) and (b).

In response to public comment, the commission is inserting a reference to precursors of criteria pollutants into §101.338(b) and substituting the word "and" for "if" in regard to reducing a criteria pollutant and its greater health benefit. The commission is substituting "Mexican" for "international" in §101.338(c) for greater specificity. The commission is also adding the EPA as an approving authority for the validity of creditable reductions.

§101.339. Program Audits and Reports.

The new §101.339 includes program audit and report requirements for emission credit programs applicable to electric generating and grandfathered facilities. The section contains similar audit and report requirements as are applicable to the commission's other cap and trade programs. These requirements are used by the commission and the EPA to evaluate the effectiveness of the program and include reportable items such as effect on ozone attainment, number of allowances or credits traded, cost of allowances or credits, and number of allowances in each compliance account. In response to public comment, the commission is adding sulfur dioxide (SO_2) as a pollutant that is subject to program audit requirements because grandfathered facilities are required to hold SO_2 allowances.

§101.372. General Provisions.

In order to better organize similar rule requirements, the commission deletes §101.372(a)(2) and relocates this language concerning emission creditable reductions occurring outside the United States to new §101.375, Emission Reductions Achieved Outside the United States. The commission amends §101.372(d)(1)(C)(vi) to require the rejection of a quantification protocol if the EPA objects to the quantification protocol during the 45-day adequacy review period or if the EPA publishes in the

Federal Register a disapproval of the quantification protocol. This does not substantially affect the procedures to approve the quantification protocol. This revision clarifies in the rule that the quantification protocols would not be approved if the EPA objects to them. The commission also removes language from this section concerning credits for emission reductions outside the United States and the options for applying them. This language, modified to be consistent with the changes to THSC, §382.0172(c), enacted under SB 784, is moved to the new §101.375 in order to be considered separately by the EPA for approval into the SIP and not delay approval of other portions of the EBTP. In response to public comment, the commission is removing the reference to credits for emission reductions in other nations in §101.372(f)(7) and will use "emission reductions" instead.

§101.373. Discrete Emission Reduction Credit Generation and Certification.

The amendment to §101.373(a)(1) and (2) removes the ability to generate DERCs from facility shutdowns. The commission adopts this amendment in response to the *Federal Register* notice requiring the correction of program deficiencies prior to the approval of the EBTP into the SIP. The EPA has stated that banking and trading programs are intended to encourage innovative and creative emission reductions and shutdowns generally do not fall into this category. Shutdowns are also problematic for these programs because of the possibility that a facility may shut down in one area, generate and sell credits, but then relocate operations to other areas or states. Additionally, when activity level increases cause emission increases, mitigating reductions are typically not required. Thus, allowing the generation of tradable credits as a result of activity level decreases (including shutdowns) may tend to promote emissions increases. Such patterns of activity related to shutdowns have the potential to interfere with attainment.

§101.375. Emission Reductions Achieved Outside the United States.

The new §101.375 relocates existing language concerning use of emission reductions from outside the United States in §101.372(a)(2) and (f)(8). The revisions reflect the SB 784 change to THSC, §382.0172(c), which allows facilities to substitute emission reductions in criteria or precursor pollutants outside the United States if it is a reduction in an air contaminant for which the area, where the facility is located, has been designated as nonattainment, or if the reduction will result in a greater overall health benefit for the area. This will allow the continuance of beneficial emission credit programs for reductions in Ciudad Juárez in the event of El Paso being reclassified as an attainment area.

The commission is moving the rules governing optional reductions to their own sections (§§101.305, 101.338, and 101.375) so that they may be considered separately by EPA for approval into the SIP and will not delay approval of other portions of the EBTP. In response to public comment, the commission is removing the reference to credits for emission reductions in §101.375(a) and will instead refer to the use of emission reductions in both §101.375(a) and (b).

In response to public comment, the commission is inserting a reference to precursors of criteria pollutants into §101.375(b) and substituting the word "and" for "if" in regard to reducing a criteria pollutant and its greater health benefit. The commission is substituting "Mexican" for "international" in §101.375(c) for greater specificity. The commission is also adding the EPA as an approving authority for the validity of creditable reductions.

§101.376. Discrete Emission Credit Use.

The commission is amending this section to refer only to §106.261 and §101.262 to update references due to previous rule changes.

§101.378. Discrete Emission Credit Banking and Trading.

The amendment to §101.378 changes the lifetime of DERCs generated from shutdowns. Companies that have previously certified DERCs from shutdowns will have no more than five years from the September 8, 2005, commitment letter to the EPA to use the DERCs. As a result, DERCs that were generated from shutdowns prior to September 30, 2002, are available for use until September 8, 2010. After that date, the DERCs generated from shutdowns before September 30, 2002, will be removed from the DERC registry and will no longer be available for use. DERCs generated from shutdowns after September 30, 2002, may not be used. The reason for this action is included in the discussion of changes to §101.373 in this preamble.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action does meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amendments to Chapter 101 and revisions to the SIP phase out DERCs generated from shutdowns

prior to September 30, 2002, require removal of DERCs generated from shutdowns after September 30, 2002, from the DERC registry, implement the provisions of SB 784, reorganize various rules, correct one citation, specify the time the EPA has to object to quantification protocols, eliminate future generation of shutdown DERCs, and add a reference to the highly-reactive volatile organic compound cap and trade program. With the exception of the portions of the rulemaking regarding shutdown DERCs, the amendments to Chapter 101 are not specifically intended to protect the environment or reduce risks to human health from environmental exposure to air pollutants; although, the underlying emissions banking and trading programs are intended to achieve these goals. The rulemaking provides flexibility regarding credits near the Texas - Mexico border by implementing SB 784 and makes various administrative changes. The changes to shutdown DERCs generation and use are adopted to bring the DERC program into compliance with EPA program requirements, allowing the DERC program to be approved as part of the SIP and to ensure air quality standards will be met. This rulemaking does not meet any of the four applicability criteria of a "major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225 applies only to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. Specifically, the banking and trading program amendments were developed to implement the provisions of SB 784, limit the use of DERCs generated from shutdowns to bring the banking and trading program into compliance with federal requirements, and make several

administrative changes. This rulemaking does not exceed an express requirement of federal or state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed under federal law and authorized under the THSC.

The rulemaking implements requirements of 42 United States Code (USC), §7410, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the national ambient air quality standard (NAAQS) in each air quality control region of the state. While 42 USC, §7410 does not require specific programs, methods, or reductions to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the Federal Clean Air Act (FCAA) does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods to attain the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements

of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of adopted regulations in the Texas Government Code was amended by SB 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed earlier in this preamble, 42 USC, §7410 does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the

conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission contends that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC, §7410. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2) requires attainment as expeditiously as practicable, and 42 USC, §7511(a), requires states to submit ozone attainment demonstration SIPs for ozone nonattainment areas such as the Houston - Galveston - Brazoria (HGB) area. The adopted rules, which will reduce ambient concentrations of ozone precursors in nonattainment areas, will be submitted to the EPA as one of several measures in the federally approved SIP. As discussed earlier in this preamble, the banking and trading scheme in the adopted rules is necessary to address some of the elevated criteria or precursor pollutant levels observed in various nonattainment areas in Texas; this scheme will result in reductions in criteria or precursor pollutants in nonattainment areas and help bring areas into compliance with the air quality standards established under federal law as NAAQS.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. The commission presumes that "when an agency interpretation is in effect at

the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485. 489 (Tex. App.–Austin 1995), *writ denied with per curiam opinion respecting another issue*, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App.–Austin 1990), *no writ*; *Cf. Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App.–Austin 2000), *pet. denied*; and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

As discussed, this rulemaking action implements requirements of 42 USC, §7410. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is it adopted solely under the general powers of the agency. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382 (TCAA), and Texas Water Code that are cited in the STATUTORY AUTHORITY section of this preamble, including THSC, §§382.011, 382.012, 382.014, 382.016, and 382.017. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the rulemaking does not meet any of the four applicability requirements.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact assessment for this rulemaking action under Texas Government Code, §2007.043. The amendments to Chapter 101 and revisions to the SIP phase out DERCs generated from shutdowns prior to September 30, 2002, require removal of DERCs generated from shutdowns after September 30, 2002, from the DERC registry, implement the provisions of SB 784, reorganize various rules, specify the time the EPA has to object to quantification protocols, eliminate future generation of shutdown DERCs, and add a reference to the highly-reactive volatile organic compound cap and trade program. Specifically, the banking and trading program amendments in this adoption were developed to implement the provisions of SB 784, limit the use of DERCs generated from shutdowns to comply with federal requirements, and make several administrative changes. Promulgation and enforcement of the amendments will not burden private real property. The rules do not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the credits created under these rules are not property rights (§101.372(j)). Because DERCs are not property, phasing out shutdown DERCs does not constitute a taking. Consequently, this rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

Additionally, Texas Government Code, §2007.003(b)(4) provides that Chapter 2007 does not apply to this rulemaking action because it is reasonably taken to fulfill an obligation mandated by federal law. The changes regarding shutdown DERCs within this adoption were developed to meet the EPA conditional program approval so that these requirements can be approved into the SIP and used to meet NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Under 42 USC, §7410,

and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to meet the air quality standards established under federal law as NAAQS. However, this rulemaking is only one step among many necessary for attaining the ozone NAAQS.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, the commission's rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). No new sources of air contaminants will be authorized and the revisions will maintain the same level of emissions control as previous rules. The CMP policy applicable to this rulemaking action is the policy that the commission's rules comply with federal regulations in 40 Code of Federal Regulations, to protect and enhance air quality in the coastal areas (31 TAC §501.14(q)). This rulemaking action complies with

40 Code of Federal Regulations Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The new and amended sections are applicable requirements under the Federal Operating Permits Program, but no revisions to operating permits will be required.

PUBLIC COMMENT

The commission conducted a public hearing on this proposal in Austin on May 22, 2006. Vinson & Elkins, LLP on behalf of El Paso Electric Company (ELPE), EPA, Houston Regional Group of the Sierra Club (HSC), and Baker Botts, L.L.P. on behalf of the Texas Industry Project (TIP) submitted comments during the public comment period, which closed on May 30, 2006.

RESPONSE TO COMMENTS

TIP expresses general support for the proposal. The EPA expresses general support for these parts of the proposal as having met the conditions of the letter of commitment to address deficiencies in the banking program: §§101.302(d)(1)(C)(vi); 101.305; 101.306(a)(5); 101.372(d)(1)(C)(vi); 101.373; 101.375; 101.376(c)(4); and 101.378(b).

The EPA comments that the proposal preamble incorrectly refers to the EBTP as an open market program when it is more correctly referenced as a cap and trade program.

The commission agrees with this statement and is changing the preamble.

EPLE requests that the commission modify §101.302 to remove restrictions on which criteria pollutant reductions outside the United States may be creditable. ELPE states that SB 784 allows reductions in any criteria pollutant outside the United States that otherwise meets requirements for a creditable reduction (real, enforceable, quantifiable, permanent, and surplus), to be certified as a reduction for a different pollutant regardless of the surrounding area's attainment status with respect to either pollutant. EPLE requests that §101.302(f) be deleted or modified so that emission reductions outside the United States, but within 100 kilometers of the United States - Mexico border, are eligible for certification. ELPE suggests that §101.305 be modified to reference the certification of reductions outside the United States instead of their use.

The commission is not changing the rule in response to this comment. Section 101.302(a) and (c) reference the certification of emission reductions as emission credits. Section 101.305 and SB 784 only allow emission reductions generated outside of the United States to be used to satisfy applicable emission reduction requirements. Emission reductions generated outside of the United States may not be certified as credits, which may be banked and traded statewide. Under THSC, §382.0172(b), the use of emission reductions outside the United States is intended to provide air quality benefits to specific areas within the Texas - Mexico border area. A person using the reduction achieved in Mexico must have a specific use in mind. Additionally, emission reductions in Mexico used under THSC, §382.0172(b) must be applied consistent with federal requirements, which restrict the generation and use of ERCs to nonattainment areas.

The EPA comments that the change of "and" to "or" in §101.305 would allow reductions made in Mexico to be used in attainment areas circumventing the intent of the ERCs, which are only intended to provide flexibility in nonattainment areas. Also, the EPA states the commission has not demonstrated that this revision would not violate §110(*l*) of the Federal Clean Air Act.

The commission is not changing the rule in response to this comment. Emission reductions in Mexico used under THSC, §382.0172(b) must be applied consistent with federal requirements which restrict the generation and use of emission reduction credits to nonattainment areas. Emission reductions in Mexico are substitutions only, not credits, and are not freely tradable. Should El Paso remain in nonattainment status, emission reductions and the generation of emission reduction credits must meet federal requirements and are subject to EPA approval. If as expected, El Paso is reclassified as an attainment area, the adopted rule change will allow beneficial emission reduction substitutions to continue as a result of reductions achieved in Ciudad Juárez without relating those emission reductions to the attainment status of El Paso. Because each generation and use will be subjected to case-by-case review by both the executive director as well as the EPA to ensure a greater health benefit, §110(*l*) of the Clean Air Act will not be violated.

ELPE suggests adding the phrase "except for emissions reductions achieved outside the United States" in several places in §101.302(c) and §101.373(b) to indicate that the requirements of the subsections, which relate to SIP development, do not apply to emission reductions outside the United States.

The commission is not changing the rule in response to this comment. Adding the suggested language would indicate that emission reductions outside the United States are certifiable as credits; they are not. Reductions outside the United States may be substituted for required emission reductions within a specific area, but cannot be banked as a credit for trading that has an indefinite life.

ELPE suggests that §101.305(b) and §101.375(b) be amended to correct an apparent omission and include the phrase "or precursors of criteria pollutants." ELPE and EPA commented that a reference to precursors of criteria pollutants should be included in §101.338(b).

The commission agrees with this comment and is making the necessary change in these two sections as well as §101.338(b).

The EPA comments that the word "if" in §101.305(b)(1) is confusing and suggests substitution of the word "and." The EPA comments that the use of the term "executive director" in §101.305(c)(1) - (3) is confusing because it omits EPA's co-approval authority. The EPA also comments that the word "foreign" or "Mexican" should be added to indicate that reductions must also be surplus to Mexican law.

The commission agrees with these comments and is making the necessary changes. The commission is removing the reference to "international law."

ELPE and EPA comment that §101.338(a) and (b) be modified to include the phrase "to meet the allowance holding requirements of this division" for clarification.

The commission agrees with these comments and has added the references to allowance holding requirements and precursor pollutants.

The EPA recommends that §101.338 be revised to state that international reductions under the section are only used to comply with the Chapter 101, Subchapter H, Division 2, Emission Banking and Trading Allowances, and cannot be used in the East Texas Region because of distance limitations.

The commission is not changing the rule in response to this comment. Distance limitations on the use of §101.338 are included within the section.

The EPA comments that the word "if" in §101.338(b)(1) is confusing and suggests substitution of the word "and." The EPA comments that the word "foreign" or "Mexican" be added in §101.338(c)(1) to indicate that reductions must also be surplus to Mexican law. The EPA also comments that the use of the term "executive director" in subsection (c)(1) - (3) is confusing because it omits EPA's co-approval authority.

The commission agrees with these comments and is making the necessary changes. The commission is removing the reference to "international law."

The EPA comments that §101.339(b) should be revised to include reporting requirements of actual SO_2 allowances used. HSC comments that the commission should verify emission reductions resulting in credits and determine the compliance status of the company using the credit.

The commission agrees with the EPA and is adding SO_2 to the required reporting requirements. The commission also agrees with HSC but no rule change is necessary. These procedures are currently part of the banking program.

ELPE comments that §101.372 be deleted or that §101.372(a) be modified to allow reductions outside the United States to be creditable provided the conditions of §101.375, Emission Reductions Achieved Outside the United States, are met.

The commission is not changing the rule in response to this comment. Adding the suggested language would indicate that emission reductions outside the United States are certifiable as credits; they are not. Reductions outside the United States may be substituted for required emission reductions within a specific area, but cannot be banked as a credit for trading that has an indefinite life.

The EPA comments that language in §101.372(f)(7) pertaining to reduction of VOC and NO_x be moved to §101.375 so there is no confusion whether §101.372 is further modified by §101.375. The EPA also states that the use in Texas of reductions made in Mexico should improve Texas's air quality by complying with §101.375.

The commission is changing the language in §101.372(f)(7) to refer to "emission reductions in other nations" instead of "emission credits." This will make the language consistent with other references to reductions outside the United States.

The EPA expresses concern that the incorporation of SB 784 in §101.375 would allow sources anywhere within 100 kilometers of the Texas - Mexico border to generate and use credits from Mexico. The EPA states that this provision can weaken the credit program and recommends the use of international DERCs in the event El Paso is designated as attainment. The EPA states Texas has not demonstrated that this revision will not violate FCAA, §110(*l*).

Senate Bill 784 allows the use of emission reductions in Mexico as a substitution for required emission reductions in Texas. The Mexican emission reductions are not certifiable as credits and may only be applied for a specific use in an area of Texas affected by the emissions or where a greater health benefit, as determined by the executive director and the EPA, is realized. Because each generation and use will be subjected to case-by-case review by both the executive director as well as the EPA to ensure a greater health benefit, FCAA, §110(*l*) will not be violated.

HSC opposes using creditable reductions outside the United States unless three conditions are met: the authority responsible for the regional air pollution control plan must demonstrate that all reasonably available domestic control measures have been implemented; there are insufficient domestic reductions available; and grandfathered facilities may not participate.

The commission is not changing the rule in response to this comment. The implementation of SB 784 is intended to provide incentives for cooperative efforts to reduce emissions in Mexico where those emissions directly affect Texas. The three conditions listed by HSC would work against those incentives.

HSC opposes substituting reductions in one pollutant for reductions of another, and there is no scientific method to know the relative benefits of this substitution.

The commission is not changing the rule in response to this comment. The substitution of reductions will be based on nonattainment criteria pollutants or on a finding of greater health benefit.

The EPA notes that §101.375(a) uses the phrase "use discrete emission credits for reductions" and §101.375(b) uses the phrase "use reductions." The EPA comments that the language should be made parallel.

The commission agrees with the EPA comment and is changing §101.375(a) and (b) to refer to "emission reductions."

The EPA comments that the word "if" in §101.375(b)(1) is confusing and suggests substitution of the word "and." The EPA comments that the word "foreign" or "Mexican" be added in §101.375(c)(1) to indicate that reductions must also be surplus to Mexican law. The EPA also comments that the use of

the term "executive director" in §101.375(c)(1) - (3) is confusing because it omits EPA's co-approval authority.

The commission agrees with these comments and is making the necessary changes. The commission is removing the reference to "international law."

HSC opposes the revisions in §101.378(b) and the allowed use of shutdown credits generated prior to September 30, 2002 until September 30, 2010, and supports a five-year life for these credits.

The commission is not changing the rule in response to this comment. The proposed expiration date is consistent with federal policy.

TIP requests clarification on whether credits that will expire on September 30, 2010, can be used to meet annual emission limits for calendar year 2010.

Allowance account reconciliation must occur by March 31 of the year following the control period. Discrete emission credits will have expired by the reconciliation date. Facilities not subject to a cap and trade program may use credits to meet allowable emission rates until the expiration date of September 30, 2010, but then must reduce emissions to remain in compliance with allowables for the remainder of calendar year 2010.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 1: EMISSION CREDIT BANKING AND TRADING

§§101.302, 101.305, 101.306

STATUTORY AUTHORITY

The amended and new sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended and new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The amended and new sections are also proposed under THSC, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits. The amended and new

sections are also adopted under 42 USC, §7410(a)(2)(A), that requires state implementation plans to include enforceable measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The amended and new sections implement THSC, §§382.002, 382.011, 382.012, and 382.017; and Senate Bill 784, 79th Legislature, 2005.

§101.302. General Provisions.

(a) Applicable pollutants. Reductions of criteria pollutants, excluding lead, or precursors of criteria pollutants for which an area is designated nonattainment, may qualify as emission credits. Reductions of one pollutant may not be used to meet the requirements for another pollutant, unless urban airshed modeling demonstrates that one ozone precursor may be substituted for another, subject to executive director and United States Environmental Protection Agency (EPA) approval.

(b) Eligible generator categories. The following categories are eligible to generate emission credits:

(1) facilities, including area sources;

(2) mobile sources; and

(3) any facility, including area sources, or mobile source associated with actions by federal agencies under §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans).

(c) Emission credit requirements.

(1) Emission reduction credits are certified reductions that meet the following requirements:

(A) reductions must be enforceable, permanent, quantifiable, real, and surplus;

(B) the certified reduction must be surplus at the time it is created, as well as when it is used;

(C) in order to become certified, the reduction must have occurred after the most recent year of emissions inventory used in the state implementation plan (SIP); and

(D) the facility's annual emissions prior to the reduction strategy must have been reported or represented in the emissions inventory used in the SIP.

(2) Mobile emission reduction credits are certified reductions that meet the following requirements:

(A) reductions must be enforceable, permanent, quantifiable, real, and surplus;

(B) the certified reduction must be surplus at the time it is created, as well as when it is used;

(C) in order to become certified, the reduction must have occurred after the most recent year of emissions inventory used in the SIP;

(D) the mobile source's annual emissions prior to the emission credit application must have been represented in the emissions inventory used in the SIP; and

(E) the mobile sources must have been included in the attainment demonstration baseline emissions inventory.

(3) Emission reductions from a facility or mobile source that are certified as emission credits under this division cannot be recertified in whole or in part as credits under another division within this subchapter.

(d) Protocol.

(1) All generators or users of emission credits shall use a protocol that has been submitted by the executive director to the EPA for approval, if existing for the applicable facility or mobile source, to measure and calculate baseline emissions. If the generator or user wishes to deviate from a protocol submitted by the executive director, EPA approval is required before the protocol can be used. Protocols must be used as follows.

(A) Facilities subject to the emission specifications under §§117.106, 117.206, or 117.475 of this title (relating to Emission Specifications for Attainment Demonstrations; and Emission Specifications) shall quantify reductions in nitrogen oxide emissions using the testing and monitoring methodologies identified to show compliance with the emission specification.

(B) Facilities subject to the requirements under §§115.112, 115.121, 115.122, 115.162, 115.211, 115.212, 115.352, 115.421, 115.541, or 115.542 of this title (relating to Control Requirements; and Emission Specifications) shall quantify volatile organic compound reductions using the testing and monitoring methodologies identified to show compliance with the emission specifications or requirements.

(C) If the executive director has not submitted a protocol for the applicable facility or mobile source to the EPA for approval, the following requirements apply:

(i) the amount of emission credits from a facility or mobile source, in tons per year, will be determined and certified based on quantification methodologies at least as stringent as the methods used to demonstrate compliance with any applicable requirements for the facility or mobile source;

(ii) the generator shall collect relevant data sufficient to characterize the facility's or mobile source's emissions of the affected pollutant and the facility's or mobile source's activity level for all representative phases of operation in order to characterize the facility's or mobile source's baseline emissions;

(iii) facilities with continuous emissions monitoring systems or predictive emissions monitoring systems in place shall use this data in quantifying actual emissions;

(iv) the chosen quantification protocol must be made available for public comment for a period of 30 days and must be viewable on the commission's Web site;

(v) the chosen quantification protocol and any comments received during the public comment period shall be submitted to the EPA for a 45-day adequacy review; and

(vi) quantification protocols shall not be accepted for use with this division if the executive director receives a letter objecting to the use of the protocol from the EPA

during the 45-day adequacy review or the EPA proposes disapproval of the protocol in the *Federal Register*.

(2) In the event that the monitoring and testing data required under paragraph (1) of this subsection is missing or unavailable, the facility may report actual emissions for that period of time using these listed methods in the following order of preference to determine actual emissions:

(A) continuous monitoring data;

(B) periodic monitoring data;

(C) testing data;

(D) manufacturer's data;

(E) *EPA Compilation of Air Pollution Emission Factors* (AP-42), September 2000; or

(F) material balance.

(3) When quantifying actual emissions in accordance with paragraph (2) of this subsection, the generator shall use the most conservative method for replacing the missing data, submit

the justification for not using the methods in paragraph (1) of this subsection, and submit the justification for the method used.

(e) Credit certification.

(1) The amount of emission credits in tons per year will be determined and certified, to the nearest tenth of a ton per year.

(2) Applications for certification will be reviewed in order to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director.

(3) The applicant will be notified in writing if the executive director denies the emission credit application. The applicant may submit a revised application in accordance with the requirements of this division.

(4) If a facility's or mobile source's actual emissions exceed its allowable emission limit, reductions of emissions exceeding the limit may not be certified as emission credits.

(5) Applications for certification of emission credit from reductions quantified under subsection (d)(1)(C) of this section may only be approved upon completion of the public comment period.

(f) Geographic scope. Except as provided in §101.305 of this title (relating to Emission Reductions Achieved Outside the United States), only emission reductions generated in nonattainment areas can be certified. An emission credit must be used in the nonattainment area in which it is generated unless the user has obtained prior written approval of the executive director and the EPA; and

(1) a demonstration has been made and approved by the executive director and the EPA to show that the emission reductions achieved in another county or state provide an improvement to the air quality in the county of use; or

(2) the emission credit was generated in a nonattainment area that has an equal or higher nonattainment classification than the nonattainment area of use, and a demonstration has been made and approved by the executive director and the EPA to show that the emissions from the nonattainment area where the emission credit is generated contribute to a violation of the national ambient air quality standard in the nonattainment area of use.

(g) Recordkeeping. The generator shall maintain a copy of all notices and backup information submitted to the registry for a minimum of five years. The user shall maintain a copy of all notices and backup information submitted to the credit registry from the beginning of the use period and for at least five years after. The user shall also make such records available upon request to representatives of the executive director, EPA, and any local enforcement agency. The records must include, but not necessarily be limited to:

(1) the name, emission point number, and facility identification number of each facility or any other identifying number for each mobile source using emission credits;

(2) the amount of emission credits being used by each facility or mobile source; and

(3) the specific number, name, or other identification of emission credits used for each facility or mobile source.

(h) Public information. All information submitted with notices, reports, and trades regarding the nature, quantity, and sales price of emissions associated with the use, generation, and transfer of an emission credit is public information and may not be submitted as confidential. Any claim of confidentiality for this type of information, or failure to submit all information, may result in the rejection of the emission credit application. All nonconfidential notices and information regarding the generation, availability, use, and transfer of emission credits shall be immediately made available to the public.

(i) Authorization to emit. An emission credit created under this division is a limited authorization to emit the pollutants identified in subsection (a) of this section, unless otherwise defined, in accordance with the provisions of this section, 42 United States Code, §§7401 *et seq.,* and Texas Health and Safety Code, Chapter 382, as well as regulations promulgated thereunder. An emission credit does not constitute a property right. Nothing in this division may be construed to limit the authority of the commission or the EPA to terminate or limit such authorization.

(j) Program participation. The executive director has the authority to prohibit an organization from participating in emission credit trading either as a generator or user, if the executive director determines that the organization has violated the requirements of the program, or abused the privileges provided by the program.

(k) Compliance burden. Users may not transfer their compliance burden and legal responsibilities to a third-party participant. Third-party participants may only act in an advisory capacity to the user.

(l) Credit ownership. The owner of the initial emission credit certificate shall be the owner or operator of the facility or mobile source creating the emission reduction. The executive director may approve a deviation from this subsection considering factors such as, but not limited to:

(1) whether an entity other than the owner or operator of the facility or mobile source incurred the cost of the emission reduction strategy; or

(2) whether the owner or operator of the facility or mobile source lacks the potential to generate 1/10 ton of credit.

§101.305. Emission Reductions Achieved Outside the United States.

(a) A facility may use reductions achieved outside the United States of criteria pollutants or precursors of criteria pollutants if the facility meets the requirements of subsection (c) of this section.

(b) A facility may use reductions achieved outside the United States of criteria pollutants or precursors of criteria pollutants and substitute these reductions for reductions in other criteria pollutants or precursors of criteria pollutants if the facility meets the requirements of subsection (c) of this section; and

(1) the reduction is substituted for the reduction of another criteria pollutant and the substitution results in a greater health benefit and is of equal or greater benefit to the overall air quality of the area; or

(2) a reduction of an air contaminant for which the area in which the facility is located has been designated as nonattainment or which leads to the formation of a criteria pollutant for which an area has been designated as nonattainment is substituted for any air contaminant for which the area has been designated as nonattainment or leads to the formation of any criteria pollutant for which the area has been designated as nonattainment.

(c) The use of reductions outside the United States must be approved by the executive director and the United States Environmental Protection Agency (EPA), and the user of the emission reduction must:

(1) demonstrate to the executive director and EPA that the reduction is real, permanent, enforceable, quantifiable, and surplus to any applicable Mexican, federal, state, or local law;

(2) demonstrate that the use of the reduction does not cause localized health impacts, as determined by the executive director and EPA;

(3) submit all supporting information for calculations and modeling, and any additional information requested by the executive director and EPA; and

(4) be located within 100 kilometers of the Texas - Mexico border.

(d) This section does not apply to reductions in emissions of lead.

§101.306. Emission Credit Use.

(a) Uses for emission credits. Unless precluded by a commission order or a condition or conditions within an authorization under the same commission account number, emission credits may be used as the following:

(1) offsets for a new source, as defined in §101.1 of this title (related to Definitions), or major modification to an existing source;

(2) mitigation offsets for action by federal agencies under §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans);

(3) an alternative means of compliance with volatile organic compound and nitrogen oxides reduction requirements to the extent allowed in Chapters 114, 115, and 117 of this title (relating to Control of Air Pollution from Motor Vehicles; Control of Air Pollution from Volatile Organic Compounds; and Control of Air Pollution from Nitrogen Compounds);

(4) reductions certified as emission credits may be used in netting by the original applicant, if not used, sold, reserved for use, or otherwise relied upon, as provided in §116.150 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas);

(5) an annual allocation of allowances as provided in §101.356 and §101.399 of this title (relating to Allowance Banking and Trading);

(6) compliance with motor vehicle fleet requirements to the extent allowed by §114.201 of this title (relating to Mobile Emission Reduction Credit Program); or

(7) compliance with other requirements as allowable within the guidelines of local, state, and federal laws.

(b) Credit use calculation.

(1) The number of emission credits needed by the user for offsets shall be determined as provided in §116.150 of this title.

(2) For emission credits used in compliance with Chapters 114, 115, or 117 of this title, the number of emission credits needed should be determined according to the following equation plus an additional 10% to be retired as an environmental contribution.

Figure: 30 TAC §101.306(b)(2) (No change.)

Calculation of Emission Credits Needed

$$ECs = A \times (EF_p - EF_r)$$

Where:

A	=	maximum projected annual activity level during use period
EF_p	=	projected emission rate per unit of activity during use period
EF_r	=	emission rate per unit of activity required by Chapter 114, 115, or 117

(3) For emission credits used to comply with §§117.108, 117.210, or 117.223 of this title (relating to System Cap; and Source Cap), the number of emission credits needed for increasing the 30-day rolling average emission cap or maximum daily cap should be determined according to the following equation plus an additional 10% to be retired as an environmental contribution.

Figure: 30 TAC §101.306(b)(3) (No change.)

Calculation of Emission Reductions Needed for System Cap or Source Cap

$$ECs = \left[\sum_{i=1}^{N}(H_n \times R_n) - \sum_{i=1}^{N}(H_i \times R_i)\right] \times \frac{365}{2000}$$

Where:

N	=	the total number of emission units in the source cap
i	=	each emission unit in the source cap
H_i	=	actual daily heat input, in million British thermal units (MMBtu) per day, as calculated according to §117.108(c)(1), §117.210(c)(1), or §117.223(b)(1) of this title
R_i	=	the facility's emission factor, in pounds (lb)/MMBtu, is defined as in §117.108(c)(1), §117.210(c)(1), or §117.223(b)(1) of this title
H_n	=	the maximum daily heat input, in MMBtu per day, expected for an emission unit during the use period
R_n	=	the maximum emission factor, in lb/MMBtu, expected for an emission unit during the use period

(4) Emission credits used for compliance with any other applicable program should be determined in accordance with the requirements of that program and must contain at least 10% extra to be retired as an environmental contribution, unless otherwise specified by that program.

(c) Notice of intent to use emission credits.

(1) For emission credits which are to be used as offsets in a New Source Review permit in accordance with Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), the emission credits must be identified prior to permit issuance. Prior to construction, the offsets must be provided through submittal of a completed EC-3 Form, Notice of Intent to Use Emission Credits, along with the original emission credit certificate.

(2) For emission credits that are to be used for compliance with the requirements of Chapters 114, 115, or 117 of this title or other programs, the user must submit a completed EC-3 Form along with the original emission credit certificate, at least 90 days prior to the planned use of the emission credit. Emission credits may be used only after the executive director grants approval of the notice of intent to use. The user must also keep a copy of the emission credit certificate, the notice, and all backup in accordance with §101.302(g) of this title (relating to General Provisions).

(3) If the executive director denies the facility or mobile source's use of emission credits, any affected person by the executive director's decision may file a motion for reconsideration within 60 days of the denial. Notwithstanding the applicability provisions of §50.31(c)(7) of this title (relating to Purpose and Applicability), the requirements of §50.39 of this title (relating to Motion for Reconsideration) shall apply. Only an affected person may file a motion for reconsideration.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 2: EMISSIONS BANKING AND TRADING ALLOWANCES

[§101.338]

STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The repeal is also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The repeal is also adopted under THSC, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits. The repeal is also adopted under 42 USC, §7410(a)(2)(A), that requires state implementation plans to include

enforceable measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The repeal implements THSC, §§382.002, 382.011, 382.012, and 382.017; and Senate Bill 784, 79th Legislature, 2005.

§101.338. Emission Reductions Achieved Outside the United States.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 2: EMISSIONS BANKING AND TRADING ALLOWANCES

§101.338, §101.339

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The new sections are also adopted under THSC, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits. The new sections are also adopted under 42 USC,

§7410(a)(2)(A), that requires state implementation plans to include enforceable measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The new sections implement THSC, §§382.002, 382.011, 382.012, and 382.017; and Senate Bill 784, 79th Legislature, 2005.

§101.338. Emission Reductions Achieved Outside the United States.

(a) A grandfathered or electing electric generating facility (EGF) may use reductions achieved outside the United States of criteria pollutants or precursors of criteria pollutants to meet the allowance holding requirements of this division if the facility meets the requirements of subsection (c) of this section.

(b) A grandfathered or electing EGF may use reductions achieved outside the United States of criteria pollutants or precursors of criteria pollutants and substitute these reductions for reductions in other criteria pollutants or precursors of criteria pollutants or to meet the allowance holding requirements of this division if the facility meets the requirements of subsection (c) of this section; and

(1) the reduction is substituted for the reduction of another criteria pollutant and the substitution results in a greater health benefit and is of equal or greater benefit to the overall air quality of the area; or

(2) a reduction of an air contaminant for which the area in which the facility is located has been designated as nonattainment or which leads to the formation of a criteria pollutant for which an area has been designated as nonattainment is substituted for any air contaminant for which the area has been designated as nonattainment or leads to the formation of any criteria pollutant for which the area has been designated as nonattainment.

(c) The use of reductions outside the United States must be approved by the executive director and the United States Environmental Protection Agency (EPA), and the user of the emission reduction must:

(1) demonstrate to the executive director and EPA that the reduction is real, permanent, enforceable, quantifiable, and surplus to any applicable Mexican, federal, state, or local law;

(2) demonstrate that the use of the reduction does not cause localized health impacts, as determined by the executive director and EPA;

(3) submit all supporting information for calculations and modeling, and any additional information requested by the executive director and EPA; and

(4) be located within 100 kilometers of the Texas - Mexico border.

(d) This section does not apply to reductions in emissions of lead.

§101.339. Program Audits and Reports.

(a) No later than three years after the effective date of this division, and every three years thereafter, the executive director will audit this program.

(1) The audit will evaluate the impact of the program on the state's ozone attainment demonstration, the availability and cost of allowances, compliance by the participants, and any other elements the executive director may choose to include.

(2) The executive director will recommend measures to remedy any problems identified in the audit. The trading of allowances may be discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(3) The audit data and results will be completed and submitted to the United States Environmental Protection Agency (EPA) and made available for public inspection within six months after the audit begins.

(b) No later than September 30 following the end of each control period, the executive director shall develop and make available to the general public and EPA, a report that includes:

(1) number of allowances allocated to each compliance account;

(2) total number of allowances allocated under this division;

(3) number of actual nitrogen oxides (NO_x) and sulfur dioxide (SO_2) allowances subtracted from each compliance account based on the actual NO_x and SO_2 emissions from the site; and

(4) a summary of all trades completed under this division.

SUBCHAPTER H: EMISSIONS BANKING AND TRADING

DIVISION 4: DISCRETE EMISSION CREDIT BANKING AND TRADING

§§101.372, 101.373, 101.375, 101.376, 101.378

STATUTORY AUTHORITY

The amended and new sections are adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amended and new sections are also adopted under THSC, §382.002, concerning Policy and Purpose, that establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; and §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air. The amended and new sections are also adopted under THSC, §382.014, concerning Emission Inventory, that authorizes the commission to require a person whose activities cause air contaminant emissions to submit information to enable the commission to develop an emissions inventory; §382.016, concerning Monitoring Requirements, that authorizes the commission to prescribe reasonable requirements for the measuring and monitoring of air contaminant emissions; and §382.051 and §382.0518, concerning Permitting Authority of Commission and Preconstruction Permit, that authorize the commission to issue preconstruction and operating air permits. The amended and new

sections are also adopted under 42 USC, §7410(a)(2)(A), that requires state implementation plans to include enforceable measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

The amended and new sections implement THSC, §§382.002, 382.011, 382.012, and 382.017; and Senate Bill 784, 79th Legislature, 2005.

§101.372. General Provisions.

(a) Applicable pollutants. Reductions of volatile organic compounds (VOC), nitrogen oxides (NO_x), carbon monoxide (CO), sulfur dioxide (SO_2), and particulate matter with an aerodynamic diameter of less than or equal to a nominal ten microns (PM_{10}) may qualify as discrete emission credits as appropriate. Reductions of other criteria pollutants are not creditable. Reductions of one pollutant may not be used to meet the reduction requirements for another pollutant, unless urban airshed modeling demonstrates that one may be substituted for another subject to approval by the executive director and the United States Environmental Protection Agency (EPA).

(b) Eligible generator categories. Eligible categories include the following:

(1) facilities (including area sources);

(2) mobile sources; or

(3) any facility, including area sources, or mobile source associated with actions by federal agencies under §101.30 of this title (relating to Conformity of General Federal Actions to State Implementation Plans).

(c) Discrete emission credit requirements.

(1) To be creditable as a discrete emission reduction credit (DERC), an emission reduction must meet the following:

(A) the reduction be real, quantifiable, and surplus at the time the discrete emission credit is generated;

(B) the reduction must have occurred after the most recent year of emissions inventory used in the state implementation plan (SIP) for all applicable pollutants; and

(C) the facility's annual emissions prior to the reduction strategy must have been reported or represented in the emissions inventory used for the SIP.

(2) To be creditable as a mobile discrete emission reduction credit (MDERC), an emission reduction must meet the following:

(A) the reduction must be real, quantifiable, and surplus at the time it is created;

(B) the reduction must have occurred after the most recent year of emissions inventory used in the SIP for all applicable pollutants;

(C) the mobile source's emissions must have been represented in the emissions inventory used for the SIP; and

(D) the mobile sources must have been included in the attainment demonstration baseline emissions inventory. If a mobile reduction implemented is not in the baseline for emissions, this reduction does not constitute a discrete emission reduction.

(3) Emission reductions from a facility or mobile source which are certified as discrete emission credits under this division cannot be recertified in whole or in part as emission credits under another division within this subchapter.

(d) Protocol.

(1) All generators or users of discrete emission credits must use a protocol which has been submitted by the executive director to the EPA for approval, if existing for the applicable facility or mobile source, to measure and calculate baseline emissions. If the generator or user wishes to

deviate from a protocol submitted by the executive director, EPA approval is required before the protocol can be used. Protocols shall be used as follows.

(A) Facilities subject to the emission specifications under §§117.106, 117.206, or 117.475 of this title (relating to Emission Specifications for Attainment Demonstrations; and Emission Specifications) shall quantify reductions in NO_x using the testing and monitoring methodologies identified to show compliance with the emission specification.

(B) Facilities subject to the requirements under §§115.112, 115.121, 115.122, 115.162, 115.211, 115.212, 115.352, 115.421, 115.541, or 115.542 (relating to Emission Specifications; and Control Requirements) shall quantify VOC reductions using the testing and monitoring methodologies identified to show compliance with the emission specifications or the requirements.

(C) If the executive director has not submitted a protocol for the applicable facility or mobile source to the EPA for approval, the following applies:

(i) the amount of discrete emission credits from a facility or mobile source, in tons, will be determined and certified based on quantification methodologies at least as stringent as the methods used to demonstrate compliance with any applicable requirements for the facility or mobile source;

(ii) the generator must collect relevant data sufficient to characterize the facility's or mobile source's emissions of the affected pollutant and the facility's or mobile source's activity level for all representative phases of operation in order to characterize the facility's or mobile source's baseline emissions;

(iii) facilities with continuous emissions monitoring systems or predictive emissions monitoring systems in place shall use this data in quantifying actual emissions;

(iv) the chosen quantification protocol shall be made available for public comment for a period of 30 days and shall be viewable on the commission's Web site;

(v) the chosen quantification protocol and any comments received during the public comment period shall, upon approval by the executive director, be submitted to the EPA for a 45-day adequacy review; and

(vi) quantification protocols shall not be accepted for use with this division (relating to Discrete Emission Credit Banking and Trading) if the executive director receives a letter objecting to the use of the protocol from the EPA during the 45-day adequacy review or the EPA proposes disapproval of the protocol in the *Federal Register*.

(2) In the event that the monitoring and testing data required under paragraph (1) of this subsection is missing or unavailable, the facility may report actual emissions for that period of time using these listed methods in the following order of preference to determine actual emissions:

(A) continuous monitoring data;

(B) periodic monitoring data;

(C) testing data;

(D) manufacturer's data;

(E) *EPA Compilation of Air Pollution Emission Factors* (AP-42), September 2000; or

(F) material balance.

(3) When quantifying actual emissions in accordance with paragraph (2) of this subsection, the generator shall use the most conservative method for replacing the missing data, submit the justification for not using the methods in paragraph (1) of this subsection, and submit the justification for the method used.

(e) Credit certification.

(1) The amount of discrete emission credits shall be rounded down to the nearest tenth of a ton when generated and shall be rounded up to the nearest tenth of a ton when used.

(2) Applications for certification will be reviewed in order to determine the credibility of the reductions. Reductions determined to be creditable will be certified by the executive director.

(3) The applicant will be notified in writing if the executive director denies the discrete emission credit notification. The applicant may submit a revised discrete emission credit notification in accordance with the requirements of this division.

(4) If a facility's or mobile source's emissions exceed its allowable emission limit, the amount of emissions exceeding the limit may not be certified as discrete emission credits.

(f) Geographic scope. Except as provided in paragraph (7) of this subsection and §101.375 of this title (relating to Emission Reductions Achieved Outside the United States), only emission reductions generated in the State of Texas may be creditable and used in the state with the following limitations.

(1) VOC and NO_x discrete emission credits generated in an ozone attainment area may be used in any county or portion of a county designated as attainment or unclassified, except as

specified in paragraphs (4) and (5) of this subsection and may not be used in an ozone nonattainment area.

(2) VOC and NO_x discrete emission credits generated in an ozone nonattainment area may be used either in the same ozone nonattainment area in which they were generated, or in any county or portion of a county designated as attainment or unclassified.

(3) VOC and NO_x discrete emission credits generated in an ozone nonattainment area may not be used in any other ozone nonattainment area, except as provided in this subsection.

(4) VOC discrete emission credits are prohibited from use within the covered attainment counties, as defined in §115.10 of this title (relating to Definitions), if generated outside of the covered attainment counties. VOC discrete emission credits generated in a nonattainment area may be used in the covered attainment counties, except those generated in El Paso.

(5) NO_x discrete emission credits are prohibited from use within the covered attainment counties, as defined in §115.10 of this title, if generated outside of the covered attainment counties. NO_x discrete emission credits generated in a nonattainment area, except those generated in El Paso, may be used in the covered attainment counties.

(6) CO, SO_2, and PM_{10} discrete emission credits must be used in the same metropolitan statistical area (as defined in Office of Management and Budget Bulletin Number 93-17

entitled "Revised Statistical Definitions for Metropolitan Areas" dated June 30, 1993) in which the reduction was generated.

(7) VOC and NO_x discrete emission credits generated in other counties, states, or emission reductions in other nations may be used in any attainment or nonattainment county provided a demonstration has been made and approved by the executive director and the EPA, to show that the emission reductions achieved in the other county, state, or nation improve the air quality in the county where the credit is being used.

(g) Ozone season. In areas having an ozone season of less than 12 months (as defined in 40 Code of Federal Regulations Part 58, Appendix D) VOC and NO_x discrete emission credits generated outside the ozone season may not be used during the ozone season.

(h) Recordkeeping. The generator must maintain a copy of all notices and backup information submitted to the registry for a minimum of five years, following the completion of the generation period. The user must maintain a copy of all notices and backup information submitted to the registry for a minimum of five years, following the completion of the use period. Other relevant reference material or raw data must also be maintained on-site by the participating facilities or mobile sources. The user must also maintain a copy of the generator's notice and backup information for a minimum of five years after the use is completed. The records shall include, but not necessarily be limited to:

(1) the name, emission point number, and facility identification number of each facility or any other identifying number for mobile sources using discrete emission credits;

(2) the amount of discrete emission credits being used by each facility or mobile source; and

(3) the specific number, name, or other identification of discrete emission credits used for each facility or mobile source.

(i) Public information. All information submitted with notices, reports, and trades regarding the nature, quantity of emissions, and sales price associated with the use or generation of discrete emission credits is public information and may not be submitted as confidential. Any claim of confidentiality for this type of information, or failure to submit all information may result in the rejection of the discrete emission reduction application. All nonconfidential notices and information regarding the generation, use, and availability of discrete emission credits may be obtained from the registry.

(j) Authorization to emit. A discrete emission credit created under this division is a limited authorization to emit the specified pollutants in accordance with the provisions of this section, the Federal Clean Air Act, and the Texas Clean Air Act, as well as regulations promulgated thereunder. A discrete emission credit does not constitute a property right. Nothing in this division should be construed to limit the authority of the commission or the EPA to terminate or limit such authorization.

(k) Program participation. The executive director has the authority to prohibit a company from participating in discrete emission credit trading either as a generator or user, if the executive director determines that the company has violated the requirements of the program or abused the privileges provided by the program.

(l) Compliance burden and enforcement.

(1) The user is responsible for assuring that a sufficient quantity of discrete emission credits are acquired to cover the applicable facility or mobile source's emissions for the entire use period.

(2) The user is in violation of this section if the user does not possess enough discrete emission credits to cover the compliance need for the use period. If the user possesses an insufficient quantity of discrete emission credits to cover its compliance need, the user will be out of compliance for the entire use period. Each day the user is out of compliance may be considered a violation.

(3) Users may not transfer their compliance burden and legal responsibilities to a third-party participant. Third-party participants may only act in an advisory capacity to the user.

(m) Credit ownership. The owner of the initial discrete emission credit certificate shall be the owner or operator of the facility or mobile source creating the emission reduction. The executive director may approve a deviation from this subsection considering factors such as, but not limited to:

(1) whether an entity other than the owner or operator of the facility or mobile source incurred the cost of the emission reduction strategy; or

(2) whether the owner or operator of the facility or mobile source lacks the potential to generate one tenth of a ton of credit.

§101.373. Discrete Emission Reduction Credit Generation and Certification.

(a) Methods of generation.

(1) Discrete emission reduction credits (DERC) may be generated using one of the following methods or any other method that is approved by the executive director:

(A) the installation and operation of pollution control equipment that reduces emissions below the level required of the facility; or

(B) a change in the manufacturing process that reduces emissions below the level required of the facility.

(2) DERCs may not be generated by the following strategies:

(A) permanent or temporary shutdowns or permanent curtailment of an activity at a facility;

(B) modification or discontinuation of any activity that is otherwise in violation of a federal, state, or local law;

(C) emission reductions required to comply with any provision under 42 United States Code (USC), Subchapter I regarding tropospheric ozone, or 42 USC, Subchapter IV-A regarding acid deposition control;

(D) emission reductions of hazardous air pollutants, as defined in 42 USC, §7412, from application of a standard promulgated under 42 USC, §7412;

(E) emission reductions that occurred as a result of transferring the emissions to another facility at the same site;

(F) emission reductions credited or used under any other emissions trading program;

(G) emission reductions occurring at a facility that received an alternative emission limitation to meet a state reasonably available control technology requirement, except to the

extent that the emissions are reduced below the level that would have been required had the alternative emission limitation not been issued;

(H) emission reductions at a site facility with a flexible permit, unless the reductions are made permanent and enforceable or the generator can demonstrate that the emission reductions were not used to satisfy the conditions for the facilities under the flexible permit;

(I) that portion of emission reductions funded through a state or federal program, unless specifically allowed under that program;

(J) emission reductions from a facility subject to Division 3 of this subchapter (relating to Mass Emissions Cap and Trade Program); or

(K) emission reductions from the shutdown of a facility that was not included in the state implementation plan (SIP).

(b) DERC baseline.

(1) The baseline emissions may not exceed the quantity of emissions reported in the most recent year of emissions inventory used in the SIP. For reductions being certified in accordance with §116.170(b) of this title (relating to Applicability of Emission Reductions as Offsets), the baseline

emissions may not exceed the quantity of emissions reported in the emissions inventory used in the SIP in place at the time the reduction strategy was implemented.

(2) The two consecutive calendar years for the baseline activity and emissions rate must be selected from either a period including or following the most recent year of emission inventory used in the SIP or, if that period is less than ten years, the ten consecutive years immediately preceding the emission reduction.

(3) For facilities in an area in which a SIP demonstration is not required for a criteria pollutant, the two consecutive calendar years must include or follow the 1990 emission inventory.

(4) For reduction strategies that exceed 12 months, the baseline and SIP emissions inventory are established after the first year of generation and are fixed for the life of the strategy. A new baseline is established for each unique emission reduction strategy.

(5) For facilities in existence less than 24 months or not having two complete calendar years of activity data, a shorter time period of not less than 12 months may be considered by the executive director.

(c) DERC calculation.

(1) DERCs, except for shutdowns, are calculated according to the following equation.

Figure: 30 TAC §101.373(c)(1) (No change.)

DERC Calculation

(SA) * (BER - SER) = reduction generated

Where:

SA	=	emission reduction strategy activity
BER	=	baseline emission rate, the lower of the emission rate used in reporting or representing emissions in the emissions inventory used for the state implementation plan or the average of the actual emission rates during the two-year baseline period.
SER	=	emission reduction strategy emission rate

(2) The sum of the reduction generated and the total strategy emissions must not be greater than the quantity of emissions reported or represented in the emissions inventory used for SIP determination or the two-year average baseline emissions, whichever is less.

(3) For shutdown emission reduction strategies, the quantity of emission reduction generated is equivalent to the baseline emissions.

(4) The generation period for a shutdown is five years. Shutdown DERCs must be generated and noticed to the registry on an annual basis.

(d) DERC certification.

(1) A DEC-1 Form, Notice of Generation and Generator Certification of Discrete Emission Credits, shall be submitted to the executive director no later than 90 days after the end of the generation period, or no later than 90 days after the completion of the first 12 months of generation. Submission of the DEC-1 Form should continue every 12 months thereafter for each subsequent year of generation.

(2) DERCs must be quantified in accordance with §101.372(d) of this title (relating to General Provisions). The executive director shall have the authority to inspect and request information to assure that the emission reductions have actually been achieved.

(3) An application for DERCs must include, but is not limited to, a completed DEC-1 Form signed by an authorized representative of the applicant along with the following information for each pollutant reduced at each applicable facility:

(A) the generation period;

(B) a complete description of the generation activity;

(C) for shutdown emission reduction strategies, an explanation as to whether production shifted from the shutdown facility to another facility at the same site;

(D) the amount of discrete emission credits generated;

(E) for volatile organic compound reductions, a list of the specific compounds reduced;

(F) documentation supporting the baseline activity, baseline emission rate, strategy emission rate, and strategy activity;

(G) emissions inventory data from the most recent year of emissions inventory used in the SIP and emissions inventory data for the two consecutive years used to determine the baseline activity for each applicable pollutant and emission point;

(H) the most stringent emission rate for the applicable facility, considering all the local, state, and federal applicable regulatory and statutory requirements;

(I) a complete description of the protocol used to calculate the emission reduction generated; and

(J) the actual calculations performed by the generator to determine the amount of discrete emission credits generated.

§101.375. Emission Reductions Achieved Outside the United States.

(a) A facility may use emission reductions achieved outside the United States of criteria pollutants or precursors of criteria pollutants if the facility meets the requirements of subsection (c) of this section.

(b) A facility may use emission reductions achieved outside the United States of criteria pollutants or precursors of criteria pollutants and substitute these reductions for reductions in other criteria pollutants or precursors of criteria pollutants if the facility meets the requirements of subsection (c) of this section; and

(1) the reduction is substituted for the reduction of another criteria pollutant and the substitution results in a greater health benefit and is of equal or greater benefit to the overall air quality of the area; or

(2) a reduction of an air contaminant for which the area in which the facility is located has been designated as nonattainment or which leads to the formation of a criteria pollutant for which an area has been designated as nonattainment is substituted for any air contaminant for which the area has been designated as nonattainment or leads to the formation of any criteria pollutant for which the area has been designated as nonattainment.

(c) The use of reductions outside the United States must be approved by the executive director and the United States Environmental Protection Agency (EPA), and the user of the emission reduction must:

(1) demonstrate to the executive director and EPA that the reduction is real, permanent, enforceable, quantifiable, and surplus to any applicable Mexican, federal, state, or local law;

(2) demonstrate that the use of the reduction does not cause localized health impacts, as determined by the executive director and EPA;

(3) submit all supporting information for calculations and modeling, and any additional information requested by the executive director and EPA; and

(4) be located within 100 kilometers of the Texas - Mexico border.

(d) This section does not apply to reductions in emissions of lead.

§101.376. Discrete Emission Credit Use.

(a) Requirements to use discrete emission credits. Discrete emission credits may be used if the following requirements are met.

(1) The user shall have ownership of a sufficient amount of discrete emission credits before the use period for which the specific discrete emission credits are to be used.

(2) The user shall hold sufficient discrete emission credits to cover the user's compliance obligation at all times.

(3) The user shall acquire additional discrete emission credits during the use period if it is determined the user does not possess enough discrete emission credits to cover the entire use period. The user shall acquire additional credits as allowed under this section prior to the shortfall, or be in violation of this section.

(4) Facility or mobile source operators may acquire and use only discrete emission credits listed on the registry.

(b) Use of discrete emission credits. With the exception of uses prohibited in subsection (c) of this section or precluded by commission order or condition within an authorization under the same commission account number, discrete emission credits may be used to meet or demonstrate compliance with any facility or mobile regulatory requirement including the following:

(1) to exceed any allowable emission level, if the following conditions are met:

(A) in ozone nonattainment areas, permitted facilities may use discrete emission credits to exceed permit allowables by no more than ten tons for nitrogen oxides or five tons for volatile organic compounds in a 12-month period as approved by the executive director. This use is limited to one exceedance, up to 12 months within any 24-month period, per use strategy. The user

shall demonstrate that there will be no adverse impacts from the use of discrete emission credits at the levels requested; or

(B) at permitted facilities in counties or portions of counties designated as attainment or unclassified, discrete emission credits may be used to exceed permit allowables by values not to exceed the prevention of significant deterioration significance levels as provided in 40 Code of Federal Regulations (CFR) §52.21(b)(23), as approved by the executive director prior to use. This use is limited to one exceedance, up to 12 months within any 24-month period, per use strategy. The user shall demonstrate that there will be no adverse impacts from the use of discrete emission credits at the levels requested;

(2) as new source review (NSR) permit offsets, if the following requirements are met:

(A) the user shall obtain the executive director's approval prior to the use of specific discrete emission credits to cover, at a minimum, one year of operation of the new or modified facility in the NSR permit;

(B) the amount of discrete emission credits needed for NSR offsets equals the quantity of tons needed to achieve the maximum allowable emission level set in the user's NSR permit. The user shall also purchase and retire enough discrete emission credits to meet the offset ratio requirement in the user's ozone nonattainment area. The user shall purchase and retire either the environmental contribution of 10% or the offset ratio, whichever is higher; and

(C) the NSR permit must meet the following requirements:

(i) the permit must contain an enforceable requirement that the facility obtain at least one additional year of offsets before continuing operation in each subsequent year;

(ii) prior to issuance of the permit the user shall identify the discrete emission credits; and

(iii) prior to start of operation the user shall submit a completed DEC-2 Form, Notice of Intent to Use Discrete Emission Credits, along with the original certificate;

(3) to comply with the Mass Emissions Cap and Trade Program requirements as provided in §101.356(g) of this title (relating to Allowance Banking and Trading); or

(4) to comply with Chapters 114, 115, and 117 of this title (relating to Control of Air Pollution from Motor Vehicles; Control of Air Pollution from Volatile Organic Compounds; and Control of Air Pollution from Nitrogen Compounds), as allowed.

(c) Discrete emission credit use prohibitions. A discrete emission credit may not be used under this division:

(1) before it has been acquired by the user;

(2) for netting to avoid the applicability of federal and state NSR requirements;

(3) to meet (as codified in 42 United States Code (USC), Federal Clean Air Act (FCAA)) requirements for:

(A) new source performance standards under FCAA, §111 (42 USC, §7411);

(B) lowest achievable emission rate standards under FCAA, §173(a)(2) (42 USC, §7503(a)(2));

(C) best available control technology standards under FCAA, §165(a)(4) (42 USC, §7475(a)(4)) or Texas Health and Safety Code, §382.0518(b)(1);

(D) hazardous air pollutants standards under FCAA, §112 (42 USC, §7412), including the requirements for maximum achievable control technology;

(E) standards for solid waste combustion under FCAA, §129 (42 USC, §7429);

(F) requirements for a vehicle inspection and maintenance program under FCAA, §182(b)(4) or (c)(3) (42 USC, §7511a(b)(4) or (c)(3));

(G) ozone control standards set under FCAA, §183(e) and (f) (42 USC, §7511b(e) and (f));

(H) clean-fueled vehicle requirements under FCAA, §246 (42 USC, §7586);

(I) motor vehicle emissions standards under FCAA, §202 (42 USC, §7521);

(J) standards for non-road vehicles under FCAA, §213 (42 USC, §7547);

(K) requirements for reformulated gasoline under FCAA, §211(k) (42 USC, §7545); or

(L) requirements for Reid vapor pressure standards under FCAA, §211(h) and (i) (42 USC, §7545(h) and (i));

(4) to allow an emissions increase of an air contaminant above a level authorized in a permit or other authorization that exceeds the limitations of§106.261 or §106.262 of this title (relating to Facilities (Emission Limitations); and Facilities (Emission and Distance Limitations)) except as approved by the executive director and the United States Environmental Protection Agency. This paragraph does not apply to limit the use of discrete emission reduction credits (DERC) or mobile discrete emission reduction credits in lieu of allowances under §101.356(h) of this title;

(5) to authorize a facility whose emissions are enforceably limited to below applicable major source threshold levels, as defined in §122.10 of this title (relating to General Definitions), to operate with actual emissions above those levels without triggering applicable requirements that would otherwise be triggered by such major source status; or

(6) to exceed an allowable emission level where the exceedance would cause or contribute to a condition of air pollution as determined by the executive director.

(d) Notice of intent to use.

(1) A completed DEC-2 Form, signed by an authorized representative of the applicant shall be submitted to the executive director in accordance with the following requirements.

(A) Discrete emission credits may be used only after the applicant has submitted the notice and received executive director approval.

(B) The application must be submitted at least 45 days prior to the first day of the use period if the discrete emission credits were generated from a facility, 90 days if the discrete emission credits were generated from a mobile source, and every 12 months thereafter for each subsequent year if the use period exceeds 12 months.

(C) A copy of the application shall also be sent to the federal land manager 30 days prior to use if the user is located within 100 kilometers of a Class I area, as listed in 40 CFR Part 81 (2001).

(D) The application must include, but is not limited to, the following information for each use:

(i) the applicable state and federal requirements that the discrete emission credits will be used to comply with and the intended use period;

(ii) the amount of discrete emission credits needed;

(iii) the baseline emission rate, activity level, and total emissions for the applicable facility or mobile source;

(iv) the actual emission rate, activity level, and total emissions for the applicable facility or mobile source;

(v) the most stringent emission rate and the most stringent emission level for the applicable facility or mobile source, considering all applicable regulatory requirements;

(vi) a complete description of the protocol, as submitted by the executive director to the United States Environmental Protection Agency for approval, used to calculate the amount of discrete emission credits needed;

(vii) the actual calculations performed by the user to determine the amount of discrete emission credits needed;

(viii) the date that the discrete emission credits were acquired or will be acquired;

(ix) the discrete emission credit generator and the original certificate of the discrete emission credits acquired or to be acquired;

(x) the price of the discrete emission credits acquired or the expected price of the discrete emission credits to be acquired, except for transfers between sites under common ownership or control;

(xi) a statement that due diligence was taken to verify that the discrete emission credits were not previously used, the discrete emission credits were not generated as a result of actions prohibited under this regulation, and the discrete emission credits will not be used in a manner prohibited under this regulation; and

(xii) a certification of use, that must contain certification under penalty of law by a responsible official of the user of truth, accuracy, and completeness. This certification must state that based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(2) DERC use calculation.

(A) To calculate the amount of discrete emission credits necessary to comply with §§117.108, 117.138, 117.210, or 117.223 of this title (relating to System Cap; and Source Cap), a user may use the equations listed in those sections, or the following equations.

(i) For the rolling average cap:

Figure: 30 TAC §101.376(d)(2)(A)(i) (No change.)

$$\text{Amount of DERCs Required (tons)} = \sum_{i=1}^{N}\left[\left(EH_i \times ER_i\right) - \left(H_i \times R_i\right)\right] \times \left(\frac{d}{2000}\right)$$

Where:

d = the number of days in the use period

i = each emission unit in the source or system cap

N = the total number of emission units in the source or system cap

H_i = actual daily heat input, in million British thermal units (MMBtu) per day, as calculated according to §§117.108(c)(1), 117.138(c), 117.210(c)(1) or (2), or 117.223(b)(1) of this title (relating to System Cap; and Source Cap) as applicable

R_i = actual emission rate, in pounds (lb)/MMBtu, as defined in §§117.108(c)(1), 117.138(c), 117.210(c)(1) or (2), or 117.223(b)(1) of this title as applicable

EH_i = expected new daily heat input, in MMBtu per day

ER_i = expected new emission rate, in lb/MMBtu.

(ii) For maximum daily cap:

Figure: 30 TAC §101.376(d)(2)(A)(ii) (No change.)

$$\text{Amount of DERCS Required (tons)} = \sum_{i=1}^{N} \left[\left(EH_{Mi} \times ER_i \right) - \left(H_{Mi} \times R_i \right) \right] \frac{1}{2000}$$

Where:

i	=	each emission unit in the source or system cap
N	=	the total number of emission units in the source or system cap
R_i	=	in lb/MMBtu, is defined as in §§117.108(c)(2), 117.210(c)(3), or 117.223(b)(1) of this title (relating to System Cap; and Source Cap) as applicable
H_{Mi}	=	the maximum daily heat input, in MMBtu/day, as defined in §§117.108(c)(2), 117.210(c)(3), or 117.223(b)(1) of this title as applicable
EH_{Mi}	=	expected new maximum daily heat input, in MMBtu per day
ER_i	=	expected new emission rate, in lb/MMBtu.

(B) The amount of discrete emission credits needed to demonstrate compliance or meet a regulatory requirement is calculated as follows.

Figure: 30 TAC §101.376(d)(2)(B) (No change.)

(ELA) x (EER - RER) = discrete emission credits needed

Where:

ELA = expected level of activity

EER = expected emission rate per unit activity

RER = regulatory emission rate per unit activity.

(C) The amount of discrete emission credits needed to exceed an allowable emissions level is calculated as follows.

Figure: 30 TAC §101.376(d)(2)(C) (No change.)

(ELA - PLA) x (PER) = discrete emission credits needed

Where:

ELA = expected level of activity

PLA = permitted level of activity

PER = permitted emission rate per unit activity

(D) The user shall retire 10% more discrete emission credits than are needed, as calculated in this paragraph, to ensure that the facility or mobile source environmental contribution retirement obligation will be met.

(E) If the amount of discrete emission credits needed to meet a regulatory requirement or to demonstrate compliance is greater than ten tons, an additional 5.0% of the discrete emission credits needed, as calculated in this paragraph, must be acquired to ensure that sufficient discrete emission credits are available to the user with an adequate compliance margin.

(3) A user may submit a notice late in the case of an emergency, but the notice must be submitted before the discrete emission credits can be used. The user shall include a complete description of the emergency situation in the notice of intent to use. All other notices submitted less than 45 days prior to use, or 90 days prior to use for a mobile source, will be considered late and in violation.

(4) The user is responsible for determining the credits it will purchase and notifying the executive director of the selected generating facility or mobile source in the notice of intent to use. If the generator's credits are rejected or the notice of generation is incomplete, the use of discrete emission credits by the user may be delayed by the executive director. The user cannot use any discrete emission credits that have not been certified by the executive director. The executive director may reject the use of discrete emission credits by a facility or mobile source if the credit and use cannot be demonstrated to meet the requirements of this section.

(5) If the facility is in an area with an ozone season less than 12 months, the user shall calculate the amount of discrete emission credits needed for the ozone season separately from the non-ozone season.

(e) Notice of use.

(1) The user shall calculate:

(A) the amount of discrete emission credits used, including the amount of discrete emission credits retired to cover the environmental contribution, as described in subsection (d)(2)(C) of this section, associated with actual use; and

(B) the amount of discrete emission credits not used, including the amount of excess discrete emission credits that were purchased to cover the environmental contribution, as described in subsection (d)(2)(C) of this section, but not associated with the actual use, and available for future use.

(2) DERC use is calculated by the following equations.

(A) The amount of discrete emission credits used to demonstrate compliance or meet a regulatory requirement is calculated as follows.

Figure: 30 TAC §101.376(e)(2)(A) (No change.)

(ALA) x (AER - RER) = discrete emission credits used

Where:

ALA = actual level of activity

AER = actual emission rate per unit activity

RER = regulatory emission rate per unit activity

(B) The amount of discrete emission credits used to comply with permit allowables is calculated as follows.

Figure: 30 TAC §101.376(e)(2)(B) (No change.)

(ALA - PLA) x (AER) = discrete emission credits used

Where:

ALA = actual level of activity

PLA = permitted level of activity

AER = permitted emission rate per unit activity

(3) A DEC-3 Form, Notice of Use of Discrete Emission Credits, shall be submitted to the commission in accordance with the following requirements.

(A) The notice must be submitted within 90 days after the end of the use period.

(B) The notice must be submitted within 90 days of the conclusion of each 12-month use period, if applicable.

(C) The notice is to be used as the mechanism to update or amend the notice of intent to use and must include any information different from that reported in the notice of intent to use, including, but not limited to, the following items:

(i) purchase price of the discrete emission credits obtained prior to the current use period, except for transfers between sites under common ownership or control;

(ii) the actual amount of discrete emission credits possessed during the use period;

(iii) the actual emissions during the use period for volatile organic compounds and nitrogen oxides;

(iv) the actual amount of discrete emission credits used;

(v) the actual environmental contribution; and

(vi) the amount of discrete emission credits available for future use.

(4) Discrete emission credits that are not used during the use period are surplus and remain available for transfer or use by the holder. In addition, any portion of the calculated environmental contribution not attributed to actual use is also available.

(5) The user is in violation of this section if the user submits the report of use later than the allowed 90 days following the conclusion of the use period.

§101.378. Discrete Emission Credit Banking and Trading.

(a) The credit registry. All discrete emission credit generators, users, and holders will be included in the commission's credit registry.

(1) All notices submitted by a generator, holder, or user will be reviewed for credibility; and when deemed certified, posted to the credit registry.

(2) The credit registry will assign a unique number to each certificate which will include the amount of emission reductions generated to the tenth of a ton.

(3) The credit registry will maintain a listing of all credits available or used for each ozone nonattainment area. One combined listing for all the counties or portions of counties designated as attainment or unclassified will be provided by the credit registry.

(4) The registry shall not contain proprietary information.

(b) Life of a discrete emission credit. A discrete emission credit is available for use after the DEC-1 Form, Notice of Generation and Generator Certification of Discrete Emission Credits, has been received, deemed creditable by the executive director, and deposited in the commission credit registry in accordance with subsection (a) of this section, and may be used anytime thereafter except as stated in this subsection. All credits are deposited in the credit registry and reported as available credits until they are used or withdrawn.

(1) Discrete emission credits generated from shutdown strategies prior to September 30, 2002, will be available for use until September 8, 2010.

(2) Discrete emission credits certified from facility shutdowns after September 30, 2002, may not be used.

(c) Trading. Discrete emission credits are freely transferable in whole or in part, and may be traded or sold to a new owner at any time after certification.

(1) Prior to the transfer, the executive director must be notified by means of a completed DEC-4 Form, Application for Transfer of Discrete Emission Credits.

(2) The executive director will issue a letter to the discrete emission credit purchaser reflecting the discrete emission credits purchased by the new owner, and a letter to the discrete emission credit seller showing any remaining discrete emission credits available to the original owner. Discrete emission credits are considered transferred only after the executive director grants approval of the transaction.

(3) The trading of discrete emission credits may be discontinued by the executive director in whole or in part and in any manner, with commission approval, as a remedy for problems resulting from trading in a localized area of concern.